

Audit Report



**DEFENSE SPECIAL WEAPONS AGENCY ADVISORY PANEL ON
THE NUCLEAR WEAPON EFFECTS PROGRAM**

Report Number 98-149

June 8, 1998

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**Office of the Inspector General
Department of Defense**

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Acronyms

DSB	Defense Science Board
DSWA	Defense Special Weapons Agency
FAR	Federal Acquisition Regulation
NWE	Nuclear Weapon Effects
OCI	Organizational Conflict of Interest
OSD	Office of the Secretary of Defense
PMR	Procurement Management Review
RDA	Research and Development Associates
SAGE	Scientific Advisory Group on Effects
SETA	Scientific and Engineering Technical Analysis
TI	Technical Instruction



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

June 8, 1998

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION
AND TECHNOLOGY
ASSISTANT TO THE SECRETARY OF DEFENSE
(NUCLEAR, CHEMICAL, AND BIOLOGICAL DEFENSE
PROGRAMS)
DIRECTOR, DEFENSE PROCUREMENT
DIRECTOR, ADMINISTRATION AND MANAGEMENT,
OFFICE OF THE SECRETARY OF DEFENSE
DIRECTOR, DEFENSE SPECIAL WEAPONS AGENCY

SUBJECT: Audit Report on the Defense Special Weapons Agency Advisory Panel on the
Nuclear Weapon Effects Program (Report No. 98-149)

We are providing this audit report for review and comment. The audit was conducted in response to allegations made to the Defense Hotline. Comments from the Defense Special Weapons Agency on a draft of this report were considered in preparing the final report.

DoD Directive 7650.3 requires that all recommendations be resolved promptly. Therefore, we request that the Director, Defense Special Weapons Agency, provide comments on Recommendations a. and b. by August 10, 1998.

We appreciate the courtesies extended to the audit staff. If you have questions on this audit, please contact Mr. Garold E. Stephenson at (703) 604-9332 (DSN 664-9332) or Mr. Eric B. Edwards at (703) 604-9219 (DSN 664-9219). See Appendix E for the report distribution. The audit team members are listed on the inside back cover.

David K. Steensma

David K. Steensma
Deputy Assistant Inspector General
for Auditing

Office of the Inspector General, DoD

Report No. 98-149
(Project No. 7CH-8005)

June 8, 1998

Defense Special Weapons Agency Advisory Panel on the Nuclear Weapon Effects Program

Executive Summary

Introduction. We performed the audit in response to allegations made to the Defense Hotline concerning conflicts of interest among members of the Defense Special Weapons Agency Advisory Panel on the Nuclear Weapon Effects Program.

Audit Objectives. The overall objective of the audit was to determine the validity of the allegations made to the Defense Hotline concerning potential conflicts of interest. The specific audit objectives were to determine whether the Defense Special Weapons Agency established and contracted for the Panel in accordance with applicable laws and regulations, and to evaluate the management control program as it applied to the overall audit objective. A discussion of the management control program can be found in Appendix A.

Audit Results. The allegation of conflicts of interest was partially substantiated. Although the Defense Special Weapons Agency could have requested the Defense Science Board, an approved Federal Advisory Committee, to conduct the study; they acquired the services of members of the Advisory Panel on the Nuclear Weapon Effects Program through an omnibus scientific and engineering technical analysis services contract. Six of the seven members of the Advisory Panel were employees of contractors who are likely to have future Defense Special Weapon Agency contracts. As a result, the procedures the Defense Special Weapons Agency followed to acquire the services of the Advisory Panel did not adequately protect DoD from potential conflicts of interest and did not ensure that DoD received the best value for the \$277,074 in costs incurred by the Defense Special Weapons Agency for the Panel.

Summary of Recommendations. We recommend that the Director, Defense Special Weapons Agency, implement the recommendations in the January 1996 Procurement Management Review Report as they relate to contract DNA001-93-C-0138; initiate action to replace DNA001-93-C-0138 with task order contracts in FY 1998; require future consulting agreements and contracts to have full financial and potential conflict of interests disclosures from any advisory panel members.

Management Comments. The Defense Special Weapons Agency agreed to implement the recommendations in the January 1996 Procurement Management Review Report relating to contract DNA001-93-C-0138 and agreed to require full financial disclosure on future contracts for advisory services. The Defense Special Weapons Agency did not want to initiate action to replace the current scientific engineering and technical analysis contract until after October 1998 when the Defense Special Weapons Agency

with other activities in DoD are combined into a new Defense Threat Reduction Agency. The Defense Special Weapons Agency considered the nondisclosure agreements signed by the Panel members to be an effective response to the potential conflicts of interests associated with the Nuclear Weapon Effects Program and did not want to go back now and request additional disclosures from Panel members. Part I contains a discussion of the management comments to the finding and recommendations. Part III contains the complete text of management comments.

Audit Response. In view of the Defense Special Weapons Agency comments and because the subcontract cited in the allegation was completed 15 months previously, we revised the draft recommendation on obtaining additional disclosures from Panel members and deleted a recommendation on reviewing future contracts to determine if Panel members' firms had organizational conflicts of interests. We request additional comments on implementing the recommendations in the Procurement Management Review Report and replacing the scientific engineering and technical analysis contract by August 10, 1998.

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Part I - Audit Results

Audit Background

Hotline Allegations. We performed the audit in response to allegations made to the Defense Hotline concerning conflicts of interest among members of the Defense Special Weapons Agency (DSWA) Advisory Panel (the Panel) on the Nuclear Weapon Effects (NWE) Program. See Appendix C for a discussion of the allegations to the Defense Hotline and the results of our review.

Defense Special Weapons Agency. DSWA supports DoD and other Federal agencies on matters concerning nuclear weapons and other special weapon matters. The charter for DSWA is set forth in DoD Directive 5105.31. The DSWA mission encompasses:

- o managing the Cooperative Threat Reduction Program and the nuclear weapons stockpile;
- o conducting research and development on weapons effects to ensure U.S. forces are prepared to operate on future battlefields against opponents who may possess conventional, nuclear, biological, or chemical capabilities;
- o performing survivability and lethality tests to support areas such as target vulnerability assessments and research requirements for reliable and survivable military systems; and
- o providing technical support for counterproliferation and treaty compliance.

In November 1997, the Secretary of Defense approved the establishment of the Defense Threat Reduction Agency by consolidating DSWA and two other existing agencies: the On-Site Inspection Agency and the Defense Technology Security Agency. The organizational change will eliminate redundancy, consolidate related functions, and devolve certain operational and program management functions from the office of the Under Secretary of Defense (Policy) and the Office of the Assistant to the Secretary of Defense (Nuclear, Chemical, and Biological Defense Programs) to the new organization. The Defense Threat Reduction Agency will stand up as a new agency on October 1, 1998.

Guidance on Service Contracting. Federal Acquisition Regulation (FAR) Part 37, "Service Contracting," prescribes general policy and procedures for acquiring services by contract. It distinguishes between contracts for personal services and those for nonpersonal services and includes special conditions to be observed in acquiring advisory and assistance services. Appendix D provides additional information on acquiring services by contract.

Audit Objectives

The overall objective of the audit was to determine the validity of the allegations made to the Defense Hotline concerning potential conflicts of interest. The specific audit objectives were to determine whether the Defense Special Weapons Agency established and contracted for the Panel in accordance with applicable laws and regulations and to evaluate the management control program as it applied to the overall audit objective. See Appendix A for a discussion of the audit scope and methodology and details on the management control program.

Advisory Panel on the Nuclear Weapon Effects Program

The allegation of conflicts of interest on the part of the NWE Panel members was partially substantiated. DSWA acquired the services of the members of the Advisory Panel through an omnibus scientific and engineering technical analysis (SETA) services contract. Six of the seven members of the Advisory Panel were employees of contractors who have current, and are likely to have future, DSWA contracts. DSWA could have requested the Defense Science Board (DSB), an approved Federal Advisory Committee, to conduct the study.

DSWA contracted for the services because:

- o the Deputy Director of DSWA wanted a specific person to chair the Panel so that the Deputy Director could exercise greater control over the Panel;

- o in 1993 DSWA, at the direction of the Office of the Secretary of Defense (OSD), terminated its Scientific Advisory Group on Effects (SAGE), which was a Federal Advisory Committee;

- o the Deputy Director of DSWA believed the membership of the Defense Science Board was unsuitable to conduct such a study; and

- o the pre-existing omnibus SETA contract, with its broad statement of work allowed DSWA to obtain the services of Panel members quickly and noncompetitively.

As a result, the procedures DSWA followed to acquire the services of the Panel did not adequately protect DoD from potential conflicts of interest and did not ensure that DoD received the best value for the \$277,074 in costs incurred by DSWA for the Panel.

Establishment of the Advisory Panel

Requirement for the Panel. In March 1996, the Deputy Director of DSWA requested that DSWA contract for a panel of non-Federal personnel to develop a framework of the DSWA NWE Program. The charter for the Panel was established May 1, 1996. It tasked the Panel to perform a study and to establish the rationale and main features of a program that preserves the long-term quality and reliability of nuclear weapon effects technology for DoD while incorporating new technology into user-friendly tools for warfighters.

Advisory Panel on the Nuclear Weapon Effects Program

The charter states the Panel will perform the following.

- o Review NWE technology to better understand its fundamental elements and unique aspects.
- o Consider opportunities for advancing NWE technology and determine the potential impact of such advances.
- o Assess the contribution of ongoing DSWA activities to maintain and advance NWE technology.
- o Examine the Department of Energy Science-Based Stockpile Stewardship Program, especially the Accelerated Strategic Computing Initiative, to understand how the new knowledge and tools resulting from the program can be exploited to advance NWE technology.
- o Outline the main features of a program that ensures the long-term quality and reliability of DoD NWE technology and incorporates new technology into user-friendly tools for warfighters.

The charter states that the Panel should complete its work, including a briefing and individual reports, by November 1, 1996.

Contracting for the Advisory Panel. DSWA obtained the services for the Panel by issuing Technical Instruction (TI) 96-21 under contract DNA001-93-C-0138, an omnibus SETA contract with Logicon RDA. The Technical Monitor at DSWA approved TI 96-21 on March 10, 1996. The contracting officer at DSWA approved the TI on May 28, 1996. The TI identified the specific work required, the performance schedule, and the reports due from the contractor. At the request of the Deputy Director, DSWA, the language in the TI specifically directed Logicon Research and Development Associates (Logicon RDA) to obtain the services of Panel Member A to chair the Panel and to have Panel Member A:

- o prepare and deliver the final briefing and coordinate the preparation and delivery of Panel member reports;
- o formulate the Panel charter and identify Panel membership;
- o select Panel members and deliver a brief rationale identifying the unique qualities and expertise each member brings to the Panel;
- o plan, convene, and moderate Panel meetings;
- o participate in visits to obtain information relevant to the DSWA NWE Program;

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- o provide technical expertise on NWE involving aerospace vehicles and surface and underground structures;
- o prepare reports on Panel meetings and visits; and
- o prepare and deliver progress briefings to DSWA.

The TI also tasked Logicon RDA to ensure the Panel adhered to its charter and to provide general support for the operation and maintenance of the contract, including cost tracking and control. The estimated total level of effort was 1,200 hours. The TI stated the work was within the general scope of the contract and that the cost of the effort would not increase the estimated contract cost.

Justification for Sole-Source Procurement. DSWA officials prepared a justification and approval for other than full and open competition to obtain the services of the Panel from Logicon RDA under TI 96-21. The justification and approval was signed by the DSWA Deputy Director for Special Programs on May 9, 1996, but was not certified or approved by the contracting officer, the competition advocate, or the Director for Acquisition Management at DSWA. DSWA contracting officials stated that the justification and approval for the TI was not signed because the services of the Panel were within the general scope of the statement of work for SETA contract DNA001-93-C-0138.

The unapproved justification and approval stated:

Selection of Logicon RDA to provide the support for this critical study is based on their unique experience, capabilities, and in-depth resource base provided by both on-line staff and consultive assets. Specifically, Logicon RDA has demonstrated exceptional expertise and responsiveness through development of broad based subcontractual and consultive pools; maintenance of unequaled corporate personnel with demonstrable experience in all aspects of agency responsibilities; extraordinary close ties to the policy and technical communities with which DNA works on a daily basis; and a continuous record of real-time responsiveness to unanticipated and complex program support requirements.

The justification and approval also discussed the unique qualifications of Panel Member A to chair the Panel, but did not specify his status as either an employee of Logicon RDA or as an independent consultant.

Advisory Panel on the Nuclear Weapon Effects Program

DNA001-93-C-0138 Statement of Work. DSWA awarded SETA contract DNA001-93-C-0138, valued at \$47.7 million, on July 30, 1993. The contract was a cost-plus-award-fee level-of-effort contract for professional services to be provided during FYs 1994 through 1998. The statement of work provided:

The contractor shall supply support within all levels of the DNA organization for NWE and CWE (conventional weapons effects) and related or supporting RDT&E (research, development, test and evaluation); shall support DNA personnel as required in interactions with other government agencies and with other contractors, frequently on matters that may be considered proprietary or privileged by other contractors. In all activities under this contract, the contractor shall be required to strictly conform with the Organizational Conflict of Interest requirement.

The contract statement of work specified levels of effort (hours of work) for particular categories of labor to be provided by the contractor and key personnel that were considered essential to performance of the work. The contract also specified that services of consultants "shall be at rates and for periods *approved in advance* [emphasis added] by the contracting officer." Performance of the work under the contract was as directed by the issuance of written TIs defined to include:

- (1) directions to the Contractor which suggest pursuit of certain lines of inquiry, shift work emphasis, fill in details or otherwise serve to accomplish the contractual Statement of Work; and
- (2) guidelines to the Contractor which assist in interpretation of drawings, specifications or technical portions of the work description.

The contract also stated that "the contractor shall not proceed with the work affected by the technical instruction unless and until the Contractor is notified by the Contracting Officer that the technical instruction is within the scope of the clause."

Procurement Management Review of the Contract. On January 31, 1996, the Director, Defense Procurement issued a Report on the Procurement Management Review (PMR) of DSWA that was conducted between July 10-28, 1995. The report stated the following in regard to SETA contract DNA001-93-C-0138:

...The use of this contract, with its vast range of tasks, allows the incumbent to become virtually immune to competition. The fact that the Agency Deputy Director is the Award Fee officer underscores the increasing importance of this sizeable contract. Not only does the size of the contract establish barriers to competition, but the myriad of tasks is unmanageable both from the standpoint of cost growth and contract management. It appears from the significant cost growth

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(from \$46 million representing the awarded ceiling inclusive of basic and options to a total approximate value of \$74 million in the second annual renewal option) that the current work exceeds the basic scope thereby mandating a justification and approval be prepared for subsequent out-of-scope efforts....

The PMR Report recommended that a justification and approval be prepared before entering into additional out-of-scope work under the contract and that in the future, several SETA support contracts that break the work down into manageable tasks be solicited from the technical community.

In regard to the use by DSWA of the level-of-effort contract with TIs, the PMR Report stated this type of contract:

tends to use TIs to further definitize the broad scope of work without creating a binding agreement between the contractor and the Government ... it is not always apparent that tasks were specifically outlined in the basic scope of work so that only an "interpretation" was needed at a later time....

The PMR Report recommended that the work under TIs be tied to the specific task set forth in the basic contract scope of work, and out-of-scope TIs be processed through modifications to the contract. The report also recommended that the contracting officer ensure that TIs are not a quasi-definitization methodology and that adequate controls are in place.

Implementation of PMR Recommendations. DSWA contracting officials did not implement the PMR recommendations in the issuance of TI 96-21. The TI was not tied to a specific task set forth in the basic contract and Panel Member A, whose specific effort was required, was not a key employee of Logicon RDA identified in the contract. Also, none of the other Panel members were employees of Logicon RDA. DSWA contracting officials did not approve the justification and approval and process as a contract modification because they considered the services of the Panel to be within scope of the broad statement of work for contract DNA001-93-C-0138.

DSWA Legal Review. The DSWA contracting officer stated that the DSWA General Counsel verbally agreed it was appropriate to approve TI 96-21 for the Panel and did not provide a written opinion on whether the TI was within scope of the underlying contract and required certain actions to avoid, neutralize, or mitigate conflicts of interest to comply with the organizational conflict of interest (OCI) provisions in the contract.

Subcontracting for Panel Members. On August 1, 1996, more than three months after the Panel conducted its initial meeting, the DSWA contracting officer approved the request from Logicon RDA to subcontract for the Panel members. Logicon RDA awarded a consultant agreement for Panel Member A and subcontracts to five contractors for the other six Panel members. Logicon RDA acquired the services of Panel Members B, C, F, and G on separate subcontracts, and the services of Panel Members D and E on the same

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subcontract. As shown in Table 1, Logicon RDA authorized a total of \$184,641 (\$107,999 in FY 1996 and \$76,642 in FY 1997) for compensation and other expenses for the members of the Panel.

**Table 1. Funding Authorized for Each Panel Member
(FY 1996-1997)**

<u>Panel Member</u>	<u>Logicon RDA Subcontractor</u>	<u>FY1996 Funding</u>	<u>FY1997 Funding</u>	<u>Total Funding</u>
Member A ¹		\$ 18,188	\$ 16,800	\$ 34,988
Member B	Titan	15,032	10,038	25,070
Member C	Jaycor	14,830	9,948	24,778
Members D & E	SAIC	29,989	19,913	49,902
Member F	MLI	15,000	10,000	25,000
Member G	MRC	<u>14,960</u>	<u>9,943</u>	<u>24,903</u>
Grand Total		\$107,999	\$ 76,642	\$184,641

¹Services procured under consulting agreement with member.

Waiver of Organizational Conflict of Interest Clause. On August 7, 1996, Logicon RDA requested that the DSWA contracting officer for contract DNA001-93-C-0138 approve submission of nondisclosure forms by NWE Advisory Panel members in lieu of requiring the full OCI clause to the subcontracts for the Panel's services. The nondisclosure form was a statement signed by each member agreeing not to disclose any Government-privileged or proprietary information (obtained as a member of the Panel) to anyone other than Panel members present when such information was disclosed. The members agreed in particular not to use information to give their companies or any other company an unfair competitive advantage.

On August 20, 1996, the DSWA contracting officer requested the DSWA General Counsel to review the proposed use of the nondisclosure form because of the stringent OCI requirements in the contract. On the same day, the DSWA General Counsel recommended that the contracting officer approve the contractor's request to use nondisclosure forms for two reasons.

First, the Panel has been operating since June 17, 1996, on the theory that non-disclosure statements would suffice. It would be difficult to impose stricter controls at this point even if such action was fair. Second, the Panel is taking a far too global look at DSWA to reasonably expect the members to acquire much "proprietary" info. government or commercial....

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On August 26, 1996, the contracting officer informed Logicon RDA that the submission of nondisclosure certifications by Panel members was acceptable in lieu of requiring the OCI clause. Like the consent to subcontract for the services, the contracting officer approved the waiver about 4 months after the initial Panel meeting. Logicon RDA did not bring the issue of the OCI clause to the attention of the contracting officer in a timely manner. The FAR Section 9.504 requires contracting officers to identify and assess potential OCIs as early as possible and avoid, neutralize, or mitigate significant potential conflicts of interest before contract award. In addition, FAR Section 9.505-3, "Providing Technical Evaluation or Advisory and Assistance Services," states that contracts involving advisory and assistance services should not be awarded to a contractor that would evaluate or advise the Government concerning its own products or activities, or those of a competitor, without proper safeguards to ensure objectivity and protect the Government's interests. The DSWA contracting officer did not comply with these policies.

Capability of the Defense Science Board to Provide the Advisory Services

DSWA Scientific Advisory Group on Effects. From 1992 to 1993, DSWA had an advisory panel called the Scientific Advisory Group on Effects (SAGE) that operated in accordance with the Federal Advisory and Committee Act. The mission of the SAGE was to review and evaluate long-range plans for developing and improving NWE data for DSWA. DSWA terminated the SAGE in 1993, at the direction of the Director for Administration and Management, OSD, as part of an Office of Management and Budget initiative to reduce the number of Federal Advisory Committees. In the October 20, 1993, letter that terminated the SAGE, the Director, Administration and Management stated:

Alternative means should be explored to obtain the advice performed by the SAGE. Given the nature of the efforts undertaken by the SAGE, it would seem appropriate to enlist the services of the Defense Science Board for these purposes. We have discussed this possibility with the Executive Director of the DSB and he believes that such an arrangement is feasible.

DSWA estimated that the total cost for the SAGE for FY 1993 was \$45,500, which included personnel compensation for both the non-Federal and Federal members as well as travel and per diem. The SAGE conducted 3-day meetings on two occasions.

DSWA Consultation with the DSB. DSWA officials did not consult the DSB, an approved Federal Advisory Committee, prior to procuring the advisory and assistance services to study the DSWA NWE Program. The DSWA Deputy Director stated that the DSB membership was not suitable for such a study and the DSB had not typically been used for studies at this level of detail. Panel Member A and the other Panel members were "handpicked" because they

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represented over 200 years of hands-on experience in NWE. The Deputy Director stated that the NWE Advisory Panel was not established to replace the SAGE.

DSB Capability and Expertise. The DSB conducts studies on a wide range of Defense and scientific matters. Its membership includes subject matter experts and consultants from industry, academia, and Government who have extensive experience in the fields of science and technology. After reviewing the charter of the DSWA NWE Advisory Panel, the DSB Executive Director stated that if DSWA officials had approached him with a request, he would have taken the request to the Chairman of the DSB to determine whether the DSB had, or could obtain, the expertise to perform the study. He further stated that the DSB can obtain outside consultants and draw on expertise within the Government to assist in performing studies.

In 1993, the DSB chartered a Task Force to conduct a study of all major scientific and technical projects being conducted or planned by DSWA and the value of, and technical competence of, DSWA in accomplishing the projects. The May 3, 1993, Task Force report demonstrates that the DSB could have chartered a Task Force to perform the study conducted by the Panel.

Differences between the Advisory Panel and a Federal Advisory Committee. The Panel operated under less stringent standards than a Federal advisory committee.

Scheduling and Format of Meetings. The Federal Advisory Committee Management Regulations require that a notice of each meeting of a Federal advisory committee be published in the Federal Register at least 15 days before the meeting; and that written determinations be made for each closed meeting. DSWA did not publish notices for any of the nine meetings of the Panel. The Panel members unilaterally decided to close all meetings.

Financial Disclosure Statements. DoD Directive 5500.7-R, "Joint Ethics Regulation," August 1993, requires DoD-sponsored advisory committee members to submit financial disclosure statements before assumption of duties. DSWA did not require the members of the Panel to submit financial disclosure statements to identify potential conflicts of interest.

Panel Membership. The Federal Advisory Committee Management Regulations require that the agency describe, in the proposed charter for a Federal advisory committee, how it will attain a fairly balanced membership. The agency must consider a cross-section of those directly affected, interested,

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and qualified to perform the functions of the committee. DoD Directive 5105.4 requires that the Secretary of Defense, the Deputy Secretary, or their designee approve the membership of advisory committees in DoD. However, Member A selected the other members of the NWE Advisory Panel.

Compensation of Panel Members. The Federal Advisory Committee Act; the Federal Advisory Committee Management Regulations; and OSD Administrative Instruction No. 2, "Employment of Experts and Consultants," limit the pay of members of Federal advisory committees to the daily equivalent of the maximum rate for a GS-15 unless a higher rate of pay is mandated by statute, or the head of the agency has personally determined that a higher rate of pay is justified and necessary. For 1996, the maximum rate of pay for a GS-15 was \$345.36 per day (\$43.17 per hour), which was the pay authorized for DSB members. Table 2 shows the compensation received by members of the Panel.

**Table 2. Compensation of Advisory Panel Members
through December 10, 1997**

<u>Panel Member</u>	<u>Hours Worked</u>	<u>Hourly Rate</u>	<u>Total Compensation¹</u>	<u>Total Other Expenses²</u>	<u>Costs Incurred</u>
Member A	342	\$ 75	\$25,650	\$ 6,848	\$ 32,498
Member C	54	115	6,210	18,532	24,742
Member D & E	390	55	21,450	27,564	49,014
Member F	80	89	7,120	12,841	19,961
Member G	153	49	<u>7,497</u>	<u>15,384</u>	<u>22,881</u>
Total			\$67,927	\$81,169	\$149,096

¹ Includes actual compensation for 1996 and Projected Compensation for 1997 add-on effort.

² Other Expenses include travel, over-head, and general and administrative costs.

Six of the seven members (Members A, C, D, E, F, and G) of the Panel received compensation in excess of the maximum rate for a GS-15. The six members received about \$23,937 more than they would have received at the GS-15 rate of compensation. In addition, Logicon RDA received \$127,978 for issuing and administering the subcontracts and providing executive secretarial support to the Panel.

Accomplishments of the NWE Advisory Panel

Meetings of the Panel. According to records maintained by Logicon RDA, the Panel had nine meetings between April 1996 and December 1996. The Panel provided briefings on preliminary study results to the Director of Operations, DSWA, on November 8, 1996, and the Deputy Director, DSWA, on November 13, 1996. The Panel delivered the final report to the DSWA Deputy Director on March 7, 1997.

Content of the Final Report. The final report was a 71-page, unclassified, annotated briefing, with additional appendixes that included the Panel charter and scenarios considered by the Panel. The report contained the following conclusions:

- o Major changes are needed to preserve NWE technology before it is lost.
- o DSWA is the only agency charged with the responsibility to preserve DoD nuclear effects technology.
- o The DSWA NWE Program should grow to about \$50 million a year (\$250 million over the next 5 years), excluding computational resources, maintenance and construction of test facilities, or the ongoing testable hardware program.
- o Effective nuclear deterrence and defense require safe, reliable warheads, effective delivery systems, and knowledge of NWE.
- o Present threats involve terrorism, emerging proliferants, and, over the long term, potential peer adversaries.

A March 7, 1997 letter transmitting the report to the DSWA Deputy Director stated that all members of the Panel approved the report, with the exception of one member who was unavailable for the last two meetings.

Overlap with DSB Report. The 1993 DSB Task Force Report on DSWA reached similar conclusions. The Task Force concluded:

- o NWE phenomenology and simulation were DSWA core nuclear competencies, which the DoD must retain indefinitely.
- o DSWA core competencies can make unique contributions to needed conventional force improvements provided that DSWA is appropriately staffed.
- o The Military Services were not fully maintaining nuclear-related skills to meet future needs.

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- o The technical strengths of the Department of Energy laboratories will not substitute for maintaining nuclear competence in DoD.
- o Threats have changed since the breakup of the former Soviet Union.

Conclusions

The allegation of conflicts of interest among the NWE Panel members was partially substantiated. The contracting officer failed to take timely action to develop a conflict-avoidance and mitigation plan for the work to be performed by the Panel. Also, the manner in which DSWA contracted for the Panel through Logicon RDA did not ensure that DoD received the best value for the \$277,074 in costs (\$149,096 in compensation and related expenses and \$127,978 in expenses for Logicon RDA to issue and administer the contracts) incurred by DSWA for the Panel.

Management Comments on the Finding and Audit Response

DSWA Comments on Conflicts of Interest among NWE Panel Members. DSWA agreed that the contracting officer waived the requirement for the OCI clause in the Logicon RDA contract to flow down to the subcontractors who employed members of the Panel, and to require Panel members to disclose their financial interests. DSWA further agreed that the employment of the Panel members by DSWA contractors created potential conflicts of interest. However, the finding did not include the fact that members of the Nuclear Weapon Effects Panel were required to sign statements by which they agreed to: (1) use the information they received solely for the Panel; (2) not disclose the information to any other party; and (3) not use the information to obtain a competitive advantage. DSWA stated that this form of restriction is the normal means by which to ensure that potential conflicts of interest do not become actual conflicts of interest. There is no evidence that any of the participants violated the terms of these agreements. DSWA recommended that the finding be amended to reflect this preventive action because there was no evidence of violation on the part of any of the participants.

Audit Response. The finding discusses the conditions imposed by the nondisclosure agreement on the Panel members. A nondisclosure agreement is used to protect proprietary information from improper disclosure and use of the information for any purpose other than for which it is intended. It should not be considered the only remedy to potential OCI problems. Prior to the issuance of TI 96-21 on March 10, 1996, the contracting officer did not address the potential for conflicts of interest and develop a conflict-avoidance or mitigation plan, even though he should have foreseen the potential conflicts. It was clear that the Panel would not consist of Logicon RDA employees and the performance of the Panel members would probably be inconsistent with

performance of other contracts by the Panel members and their employing companies. However, there is no evidence that DSWA contracting officer, the head of the contracting activity, or the general counsel addressed the conflict of interest issue until Logicon RDA requested the waiver of the full OCI clause and the use of the nondisclosure statements on August 7, 1996. Logicon RDA should have acknowledged and addressed the potential for an OCI with the DSWA contracting officer prior to acceptance of the TI because it was obvious from the outset that potential conflicts would arise during contract performance.

We do not agree that there is a valid basis for concluding that DSWA has effectively mitigated or neutralized the OCIs simply because no violations of the nondisclosure agreements have come to the attention of DSWA or that there is no longer a problem.

DSWA Comments on Panel Member Access to Proprietary Information. DSWA did not agree with the audit conclusion that Panel members "may have been in a position to obtain information of new technologies that could provide them a competitive advantage." The finding ignores two important facts. First, the Panel members were selected based upon their expertise in their respective fields. DSWA was looking to each of these experts to provide information regarding the opportunities for advancing NWE effects. Second, the finding disregards the restrictions imposed upon the NWE members by their agreements not to misuse any information acquired. DSWA recommends that the finding be amended to reflect the restrictions imposed and the fact that there is no evidence that any of the Panel members violated their agreements.

Audit Response. The finding does not dispute that the Panel members were knowledgeable in aspects of NWE and does state the collection of nondisclosure agreements were collected from the Panel members. However, neither DSWA nor the contractor required the Panel members to make full disclosures to the following questions, which bear on whether the Panel members had a possible conflict of interest with respect to the ability to render impartial, technically sound, and objective advice, or whether they obtained an unfair competitive advantage:

- Could you (or your organization) in either your private or Government business pursuits utilize information acquired in the performance of the proposed work, such as data generated under the contract? Information concerning DSWA and Department of Energy plans and programs? Confidential and proprietary data of others?
- Do you (or your organization) have any involvement with or interest (direct or indirect) in technologies which are, or may be, subjects of the contract, or which may be substituted for such technologies?

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- Under the proposed work, will you evaluate or inspect your own services or products, or the services or products of any other entity that has a relationship (e.g., client, organizational, financial, or other) with you (or your organization)? Does it include evaluating or inspecting a competitor's goods and services?

For future contracts for advisory services, DSWA should do a better job of mitigating potential conflicts of interest.

DSWA Comments on the PMR Findings on the SETA Contract. The PMR recommended that a sole-source justification and approval be prepared before entering into "out-of-scope" work under the contract. The auditors stated that no such justification and approval had been formally approved in this case. The statement of work in the prime contract provides, in pertinent part, that "[T]he contractor shall supply support within all levels of the DNA organization for NWE and CWE (conventional weapons effects) and related or supporting RDT&E (research, development, test and evaluation)." Not surprisingly, both the General Counsel and the Contracting Officer determined the work of the NWE Panel was within the scope of the contract. Therefore, the discussion regarding the failure to have a formally approved justification and approval is true, but irrelevant.

Audit Response. The discussion of the results of the PMR is relevant. As discussed in the finding, the DSWA did not tie TI 96-21 to a specific task set forth in the basic contract, as recommended by the PMR report. The PMR report also noted that the broad statement of work made the contract "virtually immune to competition."

DSWA Comments on Performance of Personal Services. The auditors note the requirement to obtain a written opinion from legal counsel "in doubtful cases" and noted that no written opinion was requested in this case. However, there is no evidence whatsoever that this contract involved personal services. During the informal resolution meeting with the authors, DSWA invited them to present whatever basis they had for the assumption that the contract involved personal services. The only evidence they cited was that the chairman of the NWE Panel was identified by name in the technical instruction. That being true, it is difficult to see how this could be characterized as a "doubtful case." Once again, the discussion is true, but irrelevant.

Audit Response. Based on the comments, we deleted the reference to the FAR requirement that the contracting officer document the opinion of legal counsel, if doubt exists as to whether a proposed contract is for personal or nonpersonal services. However, we continue to believe that the legal review of the TI should have been documented.

DSWA Comments on FACA Issue. About 20 to 25 percent of the report is devoted to a discussion of the qualifications of the Defense Science Board (as an "approved FACA") and of actions which would have been required under the FACA, had the NWE Panel been a committee subject to the Federal Advisory Committee Act. However, members of the NWE Panel each had a different area of subject-matter expertise and the purpose of the NWE Panel was to gain the benefit of that expertise on a subject-area by subject-area basis. There was never an intent to obtain a collegial opinion and no evidence that the NWE Panel functioned as a committee subject to the Federal Advisory Committee Act. Once again, the discussion appears to be true, but irrelevant.

Audit Response. The NWE Panel was not subject to the Federal Advisory Committee Act. However, the discussion is relevant because DSWA could have sought the assistance of the Defense Science Board, in lieu of using the SETA contract to obtain the services of the NWE Panel. Further, the discussion is relevant in order to draw a conclusion as to whether DoD received the best value for the \$277,074 in costs incurred by DSWA for the Panel. Regarding the role of the Panel members, the content of the Panel's final report includes conclusions that appear to represent a collegial opinion. The March 7, 1997, letter transmitting the report to the DSWA Deputy Director stated that all members of the Panel approved the report, with the exception of one member who was unavailable for the last two meetings.

Recommendations, Management Comments, and Audit Response

Revised Recommendation. After reviewing management comments and considering the fact that the advisory panel completed its work, we revised Recommendation c. to omit the requirement for the prime contractor to amend the consulting agreement and subcontracts requiring members of the NWE Panel to make full disclosures of all actual and potential conflicting financial interests applicable to their work on the Panel. Also, we deleted Recommendation d. that would have required contracting officers to determine if Panel members had gained an unfair competitive advantage on future contracts.

We recommend that the Director, Defense Special Weapons Agency:

a. Implement the recommendations in the January 1996 Procurement Management Review Report relating to contract DNA001-93-C-0138.

DSWA Comments. DSWA concurred, stating that the recommendations in the January 1996 report have been implemented. No justification and approval was required because the work of the NWE Panel was within the scope of the contract.

Advisory Panel on the Nuclear Weapon Effects Program

Audit Response. The PMR report recommended that the work under TIs be tied to the specific task set forth in the basic contract scope of work, and out-of-scope TIs be processed through modifications to the contract. DSWA did not tie TI 96-21 for the NWE Panel to a specific task set forth in the basic contract. The comments are not fully responsive because they do not state what procedures have been established or planned to require that each future TI issued under the contract is tied to a specific task set forth in the basic contract statement of work. Accordingly, we request that the Director, DSWA, provide additional comments on the recommendation.

b. Initiate action to replace contract DNA001-93-C-0138 with task order contracts in FY 1998.

DSWA Comments. DSWA nonconcurred, stating that the consolidation of DSWA with other DoD elements into a new agency, tentatively named the Defense Threat Reduction Agency, on October 1, 1998, will necessitate a review of all SETA contracts of the several joining elements. Contract DNA001-93-C-0138 will be replaced by a new contract. However, the type and the precise terms of the contract will be determined after analysis of the requirements.

Audit Response. The Federal Acquisition Streamlining Act of 1994 encourages agencies to award multiple, overlapping task order contracts for advisory and assistance services under a single solicitation, whenever feasible. Advisory and assistance services are defined to include the engineering and technical and other support services that have been obtained under the SETA contract. The award of a single replacement contract requires a determination that the services required are unique and so specialized that it is not practical to award more than one contract. Otherwise, the solicitation must provide for a multiple award. We request that the Director, DSWA, provide additional comments on the recommendation that clarify DSWA's intent to award one or multiple task order contracts to replace DNA001-93-C-0138.

c. Require full financial and potential conflict of interest disclosures from any advisory panel members on future consulting agreements and contracts for advisory services.

DSWA Comments. DSWA nonconcurred with the draft report recommendation requiring Logicon RDA to modify the consulting agreement and subcontracts to require that the Panel members make full disclosure of all actual and potential conflicting financial interests applicable to their work on the Panel. DSWA stated that there is no legal basis to change the terms of a contract after the performance of a contract has been completed. DSWA had no objection to full disclosure and will require such disclosure in the future. In view of the NWE Panel members' agreements not to disclose or use for competitive advantage any information acquired during the course of the Panel's existence, no action is necessary.

Audit Response. We modified the recommendation after reviewing DSWA comments. We accept the DSWA response to require full disclosure on future

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consulting agreements and contracts for advisory services. Since the subcontract was completed 15 months ago, we agree it is probably not beneficial to go back now and modify the consulting agreement and subcontract.

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Part II - Additional Information

Appendix A. Audit Process

Scope

We reviewed documents dated from October 1993 through December 1997. To accomplish our objective, we:

- o reviewed the DoD Hotline allegations to determine their validity;
- o examined the portions of contract DNA001-93-C-0138 that pertained to the establishment of the NWE Panel;
- o determined DSWA compliance with statutory and regulatory requirements for the procurement of advisory and assistance services;
- o incorporated Office of the General Counsel, DoD comments concerning the finding in Part I of this report; and
- o discussed issues related to the Panel with personnel from the Office of the Director, Administration and Management; DSWA; the Defense Science Board; and the Defense Contract Audit Agency resident auditor at Logicon RDA.

GAO High Risk Area. The General Accounting Office (GAO) has identified several high risk areas in the Department of Defense. This report provides coverage of the Defense Contract Management high risk area.

Methodology

Audit Period, Dates, and Standards. We conducted this program audit from December 1996 through February 1998 in accordance with auditing standards issued by the Comptroller General of the United States, as implemented by the Inspector General, DoD, and accordingly included such tests of management controls as we deemed necessary. We did not rely on computer-processed data to support our finding and recommendations.

Contacts During the Audit. We visited or contacted contractors and individuals and organizations within the DoD. Further details are available upon request.

Management Control Program

DoD Directive 5010.38, "Management Control Program," August 26, 1996, requires DoD organizations to implement a comprehensive system of management controls that provides reasonable assurance that programs are operating as intended to evaluate the adequacy of the controls.

Scope and Review of Management Control Program. We reviewed the management controls DSWA used to establish the Panel. In addition, we evaluated the procedures DSWA followed to identify, evaluate and resolve potential conflicts of interest in the award of contracts.

Adequacy of DSWA Management Controls. We identified a material weakness in DSWA management controls, as defined by DoD Directive 5010.38. Specifically, agency managers failed to take timely action to develop a conflict-avoidance and mitigation plan for work to be performed by contract, as required by FAR Subpart 9.5. Implementation of recommendations in this report will correct the material management control weakness and improve the identification, evaluation, and resolution of potential conflicts of interest in future contracts.

Adequacy of Management's Self-Evaluation. The DSWA self-evaluation prepared in November 1996, did not identify the management control weakness identified during the audit.

Management Comments on the Material Control Weakness. DSWA nonconcurred, stating that it considers the nondisclosure/non-use agreements signed by the NWE Panel members to be an effective response to the potential conflicts of interests associated with the NWE Program effort.

Audit Response. As discussed previously in the report, significant time passed after the issuance of TI 96-21 before the contractor informed the contracting officer of the need for the Panel members to submit nondisclosure statements. Thus, DSWA had not established effective procedures to ensure that the contracting officer identified potential OCI problems before issuing the TI to the contractor, verified the applicability of the contractor's OCI implementation plan to potential OCI problems, and recommended a course of action for avoiding, neutralizing, or mitigating potential OCI problems not covered by previous contractor OCI disclosures or the implementation plan. A copy of the report will be provided to the Under Secretary of Defense (Acquisition and Technology) and senior officials responsible for DSWA management controls.

Appendix B. Summary of Prior Coverage

Within the last 5 years, the General Accounting Office did not issue any reports concerning DSWA that directly related to the audit objective.

Inspector General, DoD, Report No. 94-174, "Organizational and Consultant Conflicts of Interest," August 10, 1994. The report stated that DoD contracting officers (including those at DSWA) did not include one or both of the conflict of interest provisions in 33 of 77 contract solicitations and that contracting officers did not include a clause restricting the activities of contractors in eight contracts that involved potential conflicts of interest. The report recommended:

- o revisions to the FAR requiring offerers to submit organizational conflict of interest certificates;
- o guidance be issued requiring contracting officers to obtain organizational conflict of interest certificates for applicable contracts;
- o internal controls be established ensuring contractor compliance with organizational conflict of interest certification requirements; and
- o eight contracts be modified to include clauses restricting contractors from bidding on future contracts.

The Director, Defense Procurement, disagreed with the recommendation to revise the FAR, but issued a memorandum that required the Military Departments and Defense agencies to include conflict of interest requirements in procurement management reviews. The Army, Navy, Air Force, and DSWA generally concurred with the other recommendations.

Director of Defense Procurement, "Procurement Management Review of Defense Nuclear Agency," January 31, 1996. The PMR concluded that the size of the SETA contract with Logicon RDA appeared to restrict competition and was administratively unmanageable from a cost-growth standpoint. The report recommended that DSWA prepare a justification and approval before entering into additional out-of-scope work under the SETA contract, and in the future solicit SETA support contracts from the technical community that are capable of breaking the work down into manageable tasks. In October 1996, DSWA agreed to implement the recommendations.

Appendix C. Allegations Made to the Defense Hotline and Audit Results

The allegations and a summary of the audit results pertaining to each allegation are provided below.

Allegation 1. There were conflicts of interest among NWE Panel members.

Audit Results. The allegation was partially substantiated. Six of the seven members of the NWE Panel were employees of contractors who have current, and are likely to have future, DSWA contracts thus creating potential conflicts of interest. Also, the DSWA contracting officer waived the requirement for the OCI clause in the Logicon RDA contract to the subcontractors and authorized the members of the Panel to submit only nondisclosure forms rather than disclose all financial interests. Therefore, the extent of potential conflicts of interest was undeterminable.

Allegation 2. There was collusion between certain DoD contractors and the NWE Advisory Panel at DSWA.

Audit Results. The allegation was not substantiated. The services of six of the seven Panel members were acquired by Logicon RDA subcontracting with five contractors which gave the appearance of collusion. However, we found no evidence of collusion among contractors participating on the NWE Panel. The NWE Panel did not make any recommendations to DSWA regarding specific contract awards.

Allegation 3. The NWE Advisory Panel members awarded contracts to companies in which they had a vested financial interest.

Audit Results. The allegation was not substantiated. The NWE Panel had no authority to make contract awards.

Allegation 4. The NWE Advisory Panel has been advising the DSWA on contract issues such as which items or services to purchase, and from which source.

Audit Results. The allegation was not substantiated. We found no evidence that the NWE Panel advised the DSWA on specific purchases or contract awards for the NWE Program.

Allegation 5. The Panel members had frequent meetings with senior DSWA officials and, as a result, were in a unique position to learn of new technology and processes.

Audit Results. The allegation was partially substantiated. The members of the NWE Panel had numerous contacts with senior DSWA officials to discuss opportunities for advancing NWE technology. Therefore, NWE Panel members

Appendix C. Allegations Made to the Defense Hotline and Audit Results

may have been in a position to obtain knowledge of new technologies that could provide them a competitive advantage if DSWA solicits bids for future contracts pertaining to the new NWE technology initiatives. The audit did not determine the extent of the knowledge that the Panel members gained regarding new technology and processes as a result of participating on the Panel.

Allegation 6. The Panel members obtained funding from DSWA to research emerging technologies and provided this information to their respective companies. The information is then used by those companies to begin work on specific new technologies so the companies can be selected if DSWA awards sole-source contracts.

Audit Results. The allegation was not substantiated. The audit did not determine the extent of the knowledge that Panel members gained regarding new technology and processes as a result of participating on the Panel. Also, we found no indications of any violations of the nondisclosure agreement signed by each Panel member.

Appendix D. Acquiring Services by Contract

Personal Services Contract. A personal services contract is a contract that by its express terms, or as administered, makes the contractor personnel appear, in effect, as Government employees. Consequently, a personal services contract is so like an employment contract that it runs counter to the principle that the Government should obtain its employees by direct hire, under applicable civil service laws. The FAR prohibits the award of personal services contracts by an agency unless specifically authorized by Congress.

Non-Personal Services Contract. A non-personal services contract is a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees. Non-personal services contracts are proper under general contracting authority.

Advisory and Assistance Services. Advisory and assistance services are services provided under contract by nongovernmental sources to support or improve organizational policy development, decision-making, management and administration, program and/or project management and administration, or research and development activities. Categories of advisory and assistance services are management and professional support services; studies, analyses and evaluations; and engineering and technical services.

Contracting Officer Responsibilities. The contracting officer is responsible for ensuring that a proposed contract for services is proper. FAR 37.103 states that the contracting officer will:

- o determine whether the proposed service contract is for a personal or nonpersonal services contract;
- o in doubtful cases, obtain the review of legal counsel; and
- o document the file with (i) the opinion of legal counsel, if any, (ii) a memorandum of the facts and rationale supporting the conclusion that the contract does not violate the general prohibition on the award of personal services contracts, and (iii) any further documentation that the contracting agency may require.

Contracting officers are also required by FAR 9.504 to:

- o analyze planned acquisitions as early as possible in order to avoid, neutralize, or mitigate significant potential conflicts of interest before contract award;
- o evaluate potential conflicts of interest as early as possible; and

Appendix D. Acquiring Services by Contract

o develop any contract clause (restrictive clause) to restrict a contractor/contractors from bidding on certain future contracts and subcontracts that may involve potential conflicts of interest.

Federal Advisory Committees. The Federal Advisory Committee Act (Public Law 92-463 found at 5 U.S.C., Appendix 2) authorizes Federal agencies to establish and contract for advisory committees. The Federal Advisory Committee Act is implemented by Office of Management and Budget Circular No. A-135, "Management of Federal Advisory Committees," October 5, 1994; the General Services Administration Federal Advisory Committee Management Regulations (41 CFR 101-6); and DoD Directive 5105.4, "Department of Defense Federal Advisory Committee Program," September 5, 1989.

Defense Science Board. The DSB is a non-statutory Federal advisory committee established to provide independent advice to the Secretary of Defense and other senior DoD managers on scientific, technical, manufacturing, and other matters of special interest. The DSB has 30 members; the chairman is appointed by the Secretary of Defense and the vice-chairman and members are appointed by the Under Secretary of Defense for Acquisition and Technology. Membership selection for the DSB is based on expertise in science, technology, manufacturing, management, and military operations. The Executive Director of the DSB is a DoD employee, who ensures observance of conflict of interest requirements and is responsible for preparation of all documentation required by the Federal Advisory Committee Act.

Appendix E. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Acquisition and Technology

Director, Defense Procurement

Chairman, Defense Science Board

Assistant to the Secretary of Defense (Nuclear, Chemical and Biological Defense Programs)

Director, Defense Logistics Studies Information Exchange

Under Secretary of Defense (Comptroller)

Assistant Secretary of Defense (Public Affairs)

Director, Administration and Management

Department of the Army

Auditor General, Department of the Army

Department of the Navy

Assistant Secretary of the Navy (Financial Management and Comptroller)

Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller)

Defense Organizations

Director, Defense Contract Audit Agency

Director, Defense Logistics Agency

Director, Defense Special Weapons Agency

Director, National Security Agency

Inspector General, National Security Agency

Inspector General, Defense Intelligence Agency

Non-Defense Federal Organizations and Individuals

Office of Management and Budget

Technical Information Center, National Security and International Affairs Division,

General Accounting Office

Appendix E. Report Distribution

Non-Defense Federal Organizations and Individuals (Cont'd)

Chairman and ranking minority member of each of the following congressional committees and subcommittees:

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on National Security, Committee on Appropriations
House Committee on Government Reform and Oversight
House Subcommittee on Government Management, Information and Technology,
Committee on Government Reform and Oversight
House Subcommittee on National Security, International Affairs, and Criminal Justice,
Committee on Government Reform and Oversight
House Committee on National Security

Part III - Management Comments

Defense Special Weapons Agency Comments



Defense Special Weapons Agency
6801 Telegraph Road
Alexandria, Virginia 22310-3398

APR 17 1998

MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL

SUBJECT: Defense Special Weapons Agency Advisory Panel on Nuclear Weapons Effects
Panel Report, Project No. 7CH-8005

The Defense Special Weapons Agency (DSWA) appreciates the effort of the DoDIG in preparing this report, as well as the opportunity to provide our response to it.

Unlike similar reports generated by Hotline allegations, we found this report to be rather confusing and in several cases, irrelevant. We expected that these issues had been resolved during the meeting of our subject-matter experts and the authors of the report had allowed for the necessary exchange of information and that the appropriate changes would be made. This, however, did not prove true. Therefore, the attached response prepared by our legal counsel affirms our non-concurrence and addresses the specifics and rationale for such.

Please address any questions or comments to CAPT Philip H. Crowell, DSWA Inspector General at (703) 325-7096.

For the
Director

Gary L. Curtin
GARY L. CURTIN COL, USA
Major General, USAF
Director *Cherry Staff*

Attachments
as stated

**DEFENSE SPECIAL WEAPONS AGENCY RESPONSE TO
DRAFT OF A PROPOSED AUDIT REPORT**

**"Defense Special Weapons Agency Advisory Panel on
Nuclear Weapon Effects Program"**

This memorandum responds to your memorandum dated February 9, 1998, in which you requested comments on the subject draft report, hereinafter referred to as "report," that conform to the requirements of DoD Directive 7650.3. Specifically, you requested concurrence or nonconcurrence with each applicable finding, actions taken or planned in response to agreed-upon recommendations, and completion dates for the actions. You further requested specific reasons for any nonconcurrence and proposed alternative actions, if appropriate, and noted that we must comment on the material control weakness discussed in Appendix A to the report.

While we have benefited greatly from previous reports from the Department of Defense Inspector General and normally have no difficulty in responding to drafts of such reports, this draft is somewhat confusing. The "findings" of the report may be in Appendix C, Allegations Made to the Defense Hotline and Audit Results, or may be encompassed in the text of the report. In the interest of making a complete response, we will address both the "Audit Results" and the text of the report.

Starting with the "Audit Results," six allegations were made regarding the Nuclear Weapons Effects Panel (NWE). Four were found to be unsubstantiated in their entirety. We agree with those findings. Two of the allegations were found to be partially substantiated and are discussed below.

Allegation 1. There were conflicts of interest among NWE Panel members.

DSWA Comments. The auditors concluded that the allegation was partially substantiated because six of the seven members of the NWE were employees of contractors who have current and are likely to have future DSWA contracts, thus creating potential conflicts of interest. The auditors further found that the DSWA contracting officer waived the requirement for the organizational conflict of interest clause in the Logicon RDA contract to flow down to the subcontractors who employed the members of the panel and did not require the members to disclose all of their financial interests. We agree with both of these findings and the fact that the NWE members' employment by DSWA contractors created potential conflicts of interest. However, the auditors did not include in the finding the fact that DSWA required the members of the NWE to sign statements in which they agreed (1) to use the information they received solely for the purpose of the NWE, (2) not to disclose the information to any other party (including their employer), and (3) not to use the information to obtain any competitive advantage. This form of restriction is the normal means by which to ensure that potential conflicts of interest do not become actual conflicts of interest. There is no evidence that any of the

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participants violated the terms of these agreements. DSWA recommends that the finding be amended to reflect the preventive action taken by DSWA and the fact that there is no evidence of violation on the part of any of the participants.

Allegation 5. The Panel members had frequent meetings with senior DSWA officials and, as a result, were in a unique position to learn what was new in technology and process.

DSWA Comments. The auditors found that members of the NWEP had numerous contacts with senior DSWA officials to discuss opportunities for advancing NWE technology. From this they concluded that members "may have been in a position to obtain knowledge of new technologies that could provide them a competitive advantage." While we do not disagree, the finding ignores two important facts. First, the NWEP members were selected based upon their expertise in their respective fields. DSWA was looking to each of these experts to inform us regarding the opportunities for advancing NWE effects. Second, and more important, the finding disregards the restrictions imposed upon the NWE members by their agreements not to misuse any information acquired. DSWA recommends that the finding be amended to reflect the restrictions imposed and the fact that there is no evidence that any of the NWEP members violated their agreements.

Based upon these findings, the authors of the draft report make two recommendations:

Recommendation c. Require Logicon RDA to modify the consulting agreement and subcontracts to require that the members of the Nuclear Weapon Effects Advisory Panel make full disclosure of all actual and potential conflicting interests applicable to their work on the Panel.

DSWA Response. DSWA nonconcurs. While we have no objection to full financial disclosure and will require such disclosure in the future, there is no legal basis to go back after completion of the performance of a contract and change the terms of the contract. Moreover, in view of the NWEP members' agreements not to disclose or use to competitive advantage any information acquired in the course of the NWEP effort, no action is necessary.

Recommendation d. Direct contracting officers to evaluate the firms that received subcontracts for Panel members for indications of organizational conflicts of interest on future contract requirements involving the Nuclear Weapon Effects Program and, if appropriate, preclude them from bidding on the contracts.

DSWA Response. DSWA nonconcurs. In view of the nondisclosure/non-use agreements signed by the members of the NWEP, no such draconian measures are necessary. More importantly, having made a deliberate decision to rely upon the individual restrictions and not to disqualify the employing contractors from future work,

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DSWA cannot now, after the fact, undertake to disqualify these contractors. This recommendation, made in full knowledge of the no disclosure/non-use agreements, raises a fundamental question. Is there any way the Department of Defense can obtain expert advice from employees of defense contractors without disqualifying the defense contractors from future work? During an informal resolution meeting with the authors of the draft, we raised this question. The authors acknowledged that the normal practice was to obtain such agreements and offered no better solution to the perceived problem.

Turning to the text of the report, the auditors appear to focus upon three issues not raised by the allegations. First, they discuss the earlier findings of a Procurement Management Review (PMR) of the SETA contract pursuant to which the NWEF was conducted. The PMR recommended that a sole-source justification and approval (J&A) be prepared before entering into work "out-of-scope under the contract." The auditors made the point that no such J&A had been formally approved in this case. The statement of work in the prime contract provides, in pertinent part, that "[T]he contractor shall supply support within all levels of the DNA organization for NWE and CWE (conventional weapons effects) and related or supporting RDT&E (research, development, test and evaluation)." The NWEF was established to perform a study and to establish the rationale and main features of a program that preserves the long-term quality and reliability of nuclear weapon effects technology for DoD while incorporating new technology into user-friendly tools for warfighters. Not surprisingly, both the DSWA General Counsel and the DSWA contracting officer determined that the work was within the scope of the contract. This being the case, the discussion regarding the failure to have a formally approved J&A is true, but irrelevant.

A similar disconnect occurs with respect to personal services. The auditors note the requirement to obtain written opinion from legal counsel "in doubtful cases" and noted that no written opinion was requested in this case. However, there is no evidence whatsoever that this contract involved personal services. During the informal resolution meeting with the authors, DSWA invited them to present whatever basis they had for the assumption that the contract involved personal services. The only evidence they cited was that the Chairman of the NWEF was identified by name in the technical instruction. That being true, it is difficult to see how this could be characterized as a "doubtful case." Once again, the discussion is true, but irrelevant.

Finally, we must address the Federal Advisory Committee Act (FACA) issue. About 20 to 25 percent of the report is devoted to a discussion of the qualifications of the Defense Science Board (as an "approved FACA") and of actions which would have been required under the FACA had the NWEF been a committee subject to the FACA. However, the members of the NWEF each had a different area of subject-matter expertise and the purpose of the NWEF was to gain the benefit of that expertise on a subject-area by subject-area basis. There was never an intent to obtain a collegial opinion and no evidence that the NWEF functioned as a committee subject to the FACA. We were puzzled by the extensive discussion of the FACA in the predraft report and, at the informal resolution meeting, specifically asked the authors of the draft report whether it was their

Defense Special Weapons Agency Comments

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view that the NWEP was a committee subject to the FACA. The answer was that they did not consider the NWEP to be a committee subject to the FACA. The purpose of the discussion was merely to highlight what would have been required if the NWEP had been subject to the FACA. Once again, the discussion appears to be true, but irrelevant.

The remaining recommendations of the report are as follows:

Recommendation a. Implement the recommendations in the January 1996 Procurement Management Review Report relating to contract DNA001-93-C-0138.

DSWA Response. Concur. The recommendations of the report have already been implemented. DSWA notes that, in this case, no J&A was required because the work of the NWEP was clearly within the scope of the contract.

Recommendation b. Initiate action to replace DNA001-93-C-0138 with task order contracts in FY 1998.

DSWA Response. Nonconcur. With the consolidation of DSWA and other elements of the Department of Defense into a new agency, tentatively named the Defense Threat Reduction Agency, on 1 October 1998, it will be necessary to review all of the SETA contracts of the several joining elements. We anticipate that DNA001-93-C0138 will be replaced by a new contract. However, the type of contract to be used and the precise terms of the contract will be determined after analysis of the requirements.

DSWA Response to Material Control Weakness discussed in Appendix A.

The auditors stated that they identified a material weakness in DSWA management controls because they concluded that "agency managers did not comply with statutory and regulatory requirements for preventing potential conflicts of interest." DSWA nonconcur. The auditors were unable to identify any "statutory and regulatory requirements" which were violated, and we are aware of none. DSWA considers the nondisclosure/non-use agreements signed by the NWEP members to be an effective response to the potential conflicts of interests associated with the NWEP effort.

We appreciate the courtesies extended by the audit staff, including the opportunity to discuss the predraft report during the resolution meeting. This audit concerns critical issues regarding the ability of the Department of Defense to obtain expert advice from the private sector without creating actual conflicts of interest or incurring unacceptable disqualification of significant portions of the defense contracting community. It is unfortunate that we were apparently unable to effectively communicate our views to the authors of the report. We would welcome the opportunity to engage in a focused discussion of this important issue.

If you have any questions regarding these comments, please contact CAPT Phillip H. Crowell, Inspector General, DSWA, at (703) 325-7096.

Audit Team Members

This report was prepared by the Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD.

**Paul J. Granetto
Garold E. Stephenson
Eric B. Edwards
Harvey I. Gates
Ana M. Myrie**

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